Supreme Court of the United States

October Term, 1960.

No. 1004

JOSEPH A. BOLLENBERG

Petitioner

vs.

PEOPLE OF THE STATE OF NEW YORK

Respondent

Petition For a Writ of Certiorari to the Court of Appeals of the State of New York.

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Index

	Page
Opinions and Judgments Below	1
Jurisdiction	3
Statement	4
Statement as to Question I	4
Statement as to Question II	18
Questions Presented	24
Reasons for Granting the Writ	24
As to Second Question	28
Conclusion	29

CASES CITED.

Bowman v. Loperena, 311 U. S. 262, 266	4
Department of Banking v. Pink, 317 U. S. 264, 266	3
Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U. S. 206	4
Gold v. United States, 352 U. S. 985	25
Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 205-206	3
People v. Ashby, 8 N. Y. 2d 238, 241	28
Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 149-150	4
Remmer v. United States, 350 U. S. 377, 347 U. S. 227	25
Sinclair v United States, 279 U. S. 749	25
United States v. Crescent Amusement Co., 323 U. S. 173-177	3
Zimmern v. United States, 298 U. S. 167, 169	3

OTHER AUTHORITIES CITED.

	Page
28 U. S. C., Sec. 1257, 612 (3)	3
New York Code of Crim. Proc., Sec. 366, 367	10
Judiciary Law, Secs. 651, 657, 658, 659, 660, 661, 662, 667, 668, 669, 671	25 27
N. Y. Constitution, Art. 1, Sec. 11	25
U. S. Constitution, Amend. XIV, Sec. 1	25
Code of Fair Practices, Article VII	25

APPENDIX.

New York State Statutes:

Penal Law, §1864 (Fraudulent Audit)	31
Penal Law, §1294 (Grand Larceny)	32
Code of Criminal Procedure, §366	32
Code of Criminal Procedure, §367	32
Judiciary Law, §659	33
New York State Constitution, Article 1, §2	35

EXHIBITS.

A. Order Granting Enlargement of Time	36
B. Order to Show Cause and Supporting Affidavit of John R. Davison	37
Affidavit of Personal Service	48
C. Order Granting Motion	49
D. Order Amending Remittitur	51
E. Order Denying Re-argument	53

Supreme Court of the United States

October Term, 1961

No. .....

JOSEPH N. BOLLETTIERI,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the State of New York, which in turn affirmed a judgment of the Supreme Court, Oneida County, New York, convicting the petitioner, Joseph N. Bollettieri, of the crime of grand larceny first degree, and obtaining the proceeds of a fraudulent audit and sentencing said petitioner to five (5) to ten (10) years in state prison.

Opinions and Judgments Below.

The judgment of the Oneida County Supreme Court is based upon a jury verdict, finding the petitioner guilty and there was no opinion. The jury verdict was returned on

February 17th, 1960, and on February 23rd, 1960, the petitioner received a judgment of sentence as mentioned above.

Thereafter, the Fourth Department, Appellate Division of the State of New York, unanimously affirmed said judgment of conviction. Said order of affirmance was entered on July 1st, 1960, and is recorded at 11 Appellate Division Reports (New York) 906.

Thereafter and on July 12, 1960, permission to appeal to the Court of Appeals was granted by the Hon. John Van Voorhis, Associate Judge of the Court of Appeals. A certified copy of said order giving permission to appeal is attached to the record of the case and a copy of order to enlarge the time is attached hereto and marked Exhibit "A."

Thereafter, the Court of Appeals unanimously affirmed the judgment of the Appellate Division mentioned above on January 5th, 1961, and without opinion. Said order of the Court of Appeals is reported at 9 New York Reports, 2nd Series (New York State), page 629.

Thereafter, and on the 9th day of January, 1961, an order to show cause was signed by the Hon. Charles S. Desmond, Chief Justice of the Court of Appeals of the State of New York, requiring the respondent to show cause why re-argument on said appeal should not be granted, why a stay of execution of the judgment pending said re-argument should not be granted, and why the remittitur of this court should not be amended. See Exhibit "B."

Thereafter, the Court of Appeals denied said motion for re-argument, but granted a stay and said motion to amend the remittitur was further granted and was amended by adding thereto the following:

> "Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, viz: defendant

contended that his rights to due process under the Fourteenth Amendment were violated when the trial court denied his motion for a discharge of the jury panel, and for an adjournment to permit defense counsel to establish State Police investigation of the prospective jurors was improperly conducted to the prejudice of the defendant, and when the trial court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas."

The Court held there was no violation.

A copy of the Court of Appeals order is attached hereto and marked Exhibit "C."

Jurisdiction.

The judgment or order of affirmance of the Court of Appeals was rendered January 5th, 1961, re-argument was denied by order dated March 12th, 1961. The petition for re-argument was timely made as shown by Exhibit "B" on January 12, 1961. The entire court heard the motion to re-argue on the substance, and denied re-argument but granted a stay and amended the remittitur on March 2nd, 1961 (see Exhibits "C," "D" and "E").

The judgment of this court is invoked under 28 U. S. C. Section 1257, 612(3), specifically that the rights and privileges and immunities of the petitioner have been violated as guaranteed under the Constitution of the United States. Jurisdiction as to timeliness is relied upon by Rule 22 of this court. Judgment is considered suspended pending the above mentioned motion and also by:

Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 205-206;
United States v. Crescent Amusement Co., 323 U. S. 173, 177;
Zimmern v. United States, 298 U. S. 167, 169;
Department of Banking v. Pink, 317 U. S. 264, 266;

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 149-150;
Bowman v. Loperena, 311 U. S. 262, 266;
Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U. S. 206.

Statement.

Statement as to Question I.

Have the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution been violated when the Trial Court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of the petitioner?

In 1957 the petitioner was in the employ of the Public Works Department of the City of Utica, County of Oneida, New York, and held a position of Superintendent of Streets and Sewers. A Special Grand Jury charged the petitioner with the crime of grand larceny, first degree and with obtaining proceeds of a fraudulent audit. Both criminal sections are attached hereto and printed in the Appendix. The amount involved was Nine Hundred Fifty-six Dollars and Ninety-seven Cents ($956.97).

The Grand Jury that indicted the petitioner was a special one, called an Extraordinary Special and Trial Term of the Supreme Court of the County of Oneida and the prosecutor was also a special one, appointed by the Governor, to supercede the District Attorney of this county. The special investigation giving rise to this indictment and conviction commenced in June of 1958 and has been continuing since and still continuing at the present time. The Trial Judge was also a special one, appointed by the Governor and not from this district.

The trial began on January 18th, 1960, in one of two County Courthouses, which Oneida County has, namely Rome, New York. At the opening of court, counsel for petitioner made known to the Trial Court his desire to make a motion addressed to the panel of jurors and upon agreement of counsel, the following motion was made in chambers out of the hearing of the jury panel (see fols. 131 thru 137):

"Mr. Shanahan: Yes. If the Court please, at this time, on behalf of Mr. Bollettieri, whom I represent with Mr. Pawlinga, I would like to move for the discharge of the present panel of jurors, and for the selection of a new panel for the trial of this case upon the following grounds: It has come to my information through my associates in this matter, that apparently an investigation of these various prospective jurors now on this panel has been made by members of the State Police, who I am informed, are connected with the office of the Special Prosecutor. It is our information that this investigation has been conducted in this manner. *These troopers have gone to—some instances, to close neighbors of the prospective jurors, and in one instance that we know of, have gone to a relative of one of the prospective jurors, and have undertaken to question the various people whom they have sought out, apparently pursuant to a prepared questionnaire, wherein they inquire concerning the juror's general reputation; his religion, whether he attends church regularly, his political views, his views with reference to Italians or people of Italian extraction,* and generally and apparently fairly thoroughly, according to our information, seek to get information, in that manner concerning the prospective jurors. Now the difficulty about that situation, first let me say, I won't question the right of anyone to investigate in a proper way a jury panel or the prospective jurors, however, when it is done in this fashion by members of the State Police, who identify themselves as such, making inquiry of close neighbors and relatives, the information is very likely to, and in some instances we believe has, come back to the juror himself. The